Neutral Citation No: [2018] NICA 29 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* COL10722 *Delivered:* 05/09/2018

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL FROM THE DECISION OF THE SOCIAL SECURITY COMMISSIONER DATED 25 JANUARY 2016

BETWEEN:

LOUISE O'NEILL

Appellant;

-and-

DEPARTMENT FOR COMMUNITIES

Respondent.

Before: Sir John Gillen, Sir Reginald Weir and Colton J

COLTON J (delivering the judgment of the court)

Introduction

[1] This is an application by Louise O'Neill ("the applicant") under section 22 of the Social Security Administration (Northern Ireland) Act 1992 and Regulation 33 of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999 for leave to appeal to the Court of Appeal from the decision of a Social Security Commissioner C20/15-16 (ESA) dated 25 January 2016 and issued on 1 February 2016.

[2] By his decision the Social Security Commissioner dismissed Mrs. O'Neill's appeal against a decision that she was not entitled to receive Employment and Support Allowance ("ESA") for the period 28 May 2013 to 30 September 2015. The applicant now receives ESA.

Legislative framework relating to ESA

[3] Section 1 of the Welfare Reform Act (NI) 2007 sets out the basis for entitlement to ESA. One of the conditions relates to limited capability for work, expressed as follows:

> "*Entitlement*
>
> *Employment and support allowance*
>
> *1. - ….*
>
> *(3) The basic conditions are that the claimant-*
>
> *(a) has limited capability for work,*
>
> *…..*
>
> *(4) For the purposes of this Part, a person has limited capability for work if-*
>
> *(a) his capability for work is limited by his physical or mental condition, and*
>
> *(b) the limitation is such that it is not reasonable to require him to work.*
>
> *…."*

[4] Section 8 of the Welfare Reform Act (NI) 2007 then provides for regulations for the assessment of limited capability for work:

> *"Assessments relating to entitlement*
>
> *Limited capability for work*
>
> *8. - (1) For the purposes of this Part, whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work shall be determined in accordance with regulations.*
>
> *(2) Regulations under subsection (1) shall-*
>
> *(a) provide for determination on the basis of an assessment of the person concerned;*
>
> *(b) define the assessment by reference to the extent to which a person who has some specific disease or bodily or mental*

disablement is capable or incapable of performing such activities as may be prescribed;

(c) make provision as to the manner of carrying out the assessment.

….."

[5] The test for limited capability for work is set out in the Employment and Support Allowance Regulations (NI) 2008 (at Part 5 and Schedule 2). Regulation 19 states:

"PART 5 LIMITED CAPABILITY FOR WORK

Determination of limited capability for work

19. – (1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against each descriptor listed in that Schedule which applies in the claimant's case, the claimant obtains a total score of at least –

(a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;

(b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or

(c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

…

(6) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.

…"

[6] The descriptor at issue in this case is Descriptor 14 in Part 2 of Schedule 2 which states as follows:

"SCHEDULE 2

Regulation 19(2) and (3)

Assessment of whether a claimant has limited capability for work

PART 2 MENTAL, COGNITIVE AND INTELLECTUAL FUNCTION ASSESSMENT

(1)		*(2)*	*(3)*
Activity		*Descriptors*	*Points*
…………..			
14. Coping with change.	*(a)*	*Cannot cope with any change to the extent that day to day life cannot be managed.*	*15*
	(b)	*Cannot cope with minor planned change (such as a pre-arranged change to the routine time scheduled for a lunch break), to the extent that overall day to day life is made significantly more difficult.*	*9*
	(c)	*Cannot cope with minor unplanned change (such as the timing of an appointment on the day it is due to occur), to the extent that overall, day to day life is made significantly more difficult.*	*6*
	(d)	*None of the above apply.*	*0"*

Evidence before the Commissioner

[7] The applicant was in receipt of Incapacity Benefit since 15 March 1996 by reason of depression and anxiety. On 2 February 2013 she was notified by the Department for Social Development ("DSD") (now Department for Communities) that her existing claim was to be converted into a claim for ESA under the regulations implementing the Welfare Reform Act (Northern Ireland) 2007.

[8] In assessing the applicant's claim the Department had a questionnaire completed by the applicant (Form ESA50); a medical report by a healthcare professional who had examined the applicant on 23 April 2013 (form ESA85); and a factual report from the applicant's general practitioner, dated 24 March 2013 and received by DSD on 23 April 2013.

[9] In the questionnaire the applicant stated that she had suffered debilitating depression for two decades. It had become increasingly worse. She indicated that in the morning she did not want to rise and face the day ahead. She stated that life was so hard on a daily basis and she needed constant reassurance and encouragement to complete even the simplest task. The applicant had availed of counselling from Lenadoon counselling service. She also stated that her mind was in constant turmoil. In the section on coping with change, she stated that it took so much courage to agree to a planned arrangement; when it's changed it knocked her off base. In the section on going out, she stated that she was accompanied at all times when outdoors, that she became panicked with people around her, and started to hyperventilate and then the tears would start.

[10] The medical report (ESA85) indicated diagnoses of anxiety and chronic depression and hypertension. The applicant's depression and anxiety had started 20 years ago and was initially thought to have been post-natal but had not left her. It was worse in the past two and a half years since her mother had died. The applicant described feeling low mood, anxiety, fearfulness, sleep problems, loss of interest, lack of energy and low self-esteem all the time. She felt anxious when out, as if people were judging her, and felt more content in her own home. She lived with her husband, four children aged from 9 to 21, two of whom are autistic, and her 2 year old grandson. Her husband had given her a lift to the assessment and stayed in the waiting room. She had stopped work 18 years ago, mainly because of mental health. A typical day involved getting up at 6 am, making the kids' breakfast and lunch and seeing them out to school or college. She found she needed to encourage her autistic children and to cajole them. She would go with her husband in the car to leave the youngest child to school. She would come back and try to tidy and might do a few dishes. She would make the effort to wash and dress most days as she wanted to be as normal as she could for the children. However she sometimes might not dress for a couple of days and if it was a bad day she might return to bed or sit on the settee and drink tea. Her sisters might call and she might go for coffee with a sister. If her husband had work on he'd be out of the house. She would cook with her husband

in the evening and do grocery shopping with him once a week. She enjoyed walking with her husband, and her husband gave her lifts wherever she needed to go. She rarely socialised and it was almost a year since a last social outing to the opera house. She felt the house was always mad. Her daughter worked part-time and she minded her grandchild for an hour for her. She found that difficult as he was very active. The report concluded that overall the history and examination suggested no significant problems with coping with change but some problems going out and coping socially.

[11] The GP report indicated diagnoses of hypertension and depression.

[12] On 2 May 2013 DSD decided that the applicant did not satisfy the Limited Capability for Work Assessment ("LCWA") and that therefore her award of Incapacity Benefit did not qualify for conversion into ESA. DSD stated that the applicant was entitled to 6 points for Activity 15 (getting about) and 6 points for Activity 16 (coping with social engagement) which did not bring her to the requisite threshold of 15 points.

[13] The applicant appealed this decision to a Tribunal. The issue was whether she should have been awarded points under Activity 14 (coping with change). The applicant also gave oral evidence before the Tribunal. When questioned about her daily routine she said that two or three times a week her husband stayed at home. She said that her grandson was with her for one hour but that her daughter was also there at the same time. She said that her brother was the carer for her younger autistic child and that her husband picked him up from her brother's after work and looked after most things for him. She tried to keep to a routine because it suited the needs of the children. She said if there was something unexpected, she panicked. She referred to her 16 year old wanting clothes. She panicked if she needed to organise something quickly. Change of appointment was a big issue. She would be thinking about it for weeks, would do the journey mentally, it would knock her down. She would be able to go to a later appointment if she needed to; her husband would give her a lift. Also before the Tribunal were letters from Lenadoon counselling service indicating that the applicant was working on her issues of coping with change or interaction with new people which seemed to trigger her stress or anxiety levels. She had attended 55 sessions between 2006 and 2013.

[14] The Tribunal dismissed the appeal on the basis that the applicant was not entitled to any points under Activity 14. In its Statement of Reasons, issued on 23 September 2014, it stated that where there was a conflict of evidence it preferred the report of the healthcare professional which was comprehensive and objective and had been obtained through a process of clinical examination, observation and history directed specifically to the work capability assessment. The applicant's anxiety about going places and social engagement had been recognised under Activities 15 and 16. The applicant acknowledged she would be able to attend a re-arranged appointment. She coped with and had primary responsibility for a busy

household. She tried to keep to a routine because it suited the needs of the children. The Tribunal did not accept that the applicant experienced difficulties coping with change to the extent that, overall, day to day life was made significantly more difficult, or fell within the descriptors in Activity 14.

[15] The applicant appealed against the decision of the Tribunal. The appeal was heard by the Social Security Commissioner. In a decision dated 25 January 2016 and issued on 1 February 2016, the applicant's appeal was dismissed. The applicant now seeks leave from this court to appeal the decision of the Commissioner (the Commissioner refused leave to appeal to the Court of Appeal on 9 August 2016).

The decision of the Social Security Commissioner

[16] Before the Commissioner the applicant submitted that the Tribunal erred in law on the basis that its reasons for its decision on Activity 14 were inadequate and that it misdirected itself as to the meaning of Activity 14 and the word "cope" in particular.

[17] The main argument before the Commissioner was that the legislative scheme required consideration of the activities in terms of a modern workplace. It was submitted that the case of **AS v Secretary of State for Work and Pensions** [2013] UKUT 587 applied, notwithstanding that it dealt with the "Mobilising" Activity relating to physical health. (Some of the descriptors in "Mobilising" are in the form: "cannot repeatedly mobilise X metres within a reasonable timescale because of significant discomfort or exhaustion".) In **AS** the Upper Tribunal said that the tests in the mobilising descriptors had to be seen in the context of the workplace rather than in splendid isolation; what might be a "reasonable timescale" for a person at home would not necessarily be a reasonable timescale in the workplace. To ignore this robbed the word "repeatedly" of meaning. The case of **JC v Secretary of State for Work and Pensions** [2014] UKUT 352 (AAC), which related to mental health descriptors, explicitly endorsed this aspect of **AS** and stated that the activities and descriptors "have to be applied on their own terms, but understood against the backdrop of the modern workplace". It was submitted that in the subject case the Tribunal had made no reference to consideration of how the Activity 14 might apply in the workplace.

[18] It was also submitted on behalf of the applicant that coping with change meant coping with change unsupported (citing **SP v Secretary of State for Work and Pensions** [2014] UKUT 522 (AAC)). It was submitted that in the subject case the Tribunal considered coping with change in a supported context. (The applicant's husband would give her a lift to a re-scheduled appointment.) It was submitted that the Tribunal should have enquired further what the applicant meant when she said that an unexpected event "knocks her down".

[19] It was also submitted on behalf of the applicant that the Tribunal should have considered the history of the applicant's depression and what was stressful about her past employment. The applicant cited the case of **GC v Secretary of State for Work and Pensions** [2013] UKUT 405 (AAC) in which the Upper Tribunal found that the fact that the appellant's main reason for leaving a previous job was work-related stress invited consideration of why he had been unable to cope in that job. It was submitted that in the subject case the Tribunal needed to go beyond the applicant's general lifestyle and attempt the exercise of applying her functional limitations to the modern workplace.

[20] The Commissioner accepted that (based on **AS** and **JC**) descriptors must be applied on their own terms, but be understood against the backdrop of the modern workplace. The descriptors had been refined on a number of occasions since 2008 and were now more relevant to a modern workplace. However this did not imply that they should be assessed as if all of the relevant functions were to be conducted within a modern workplace. Had that been the intention of the legislature, it would have been an easy matter to say so. While some descriptors directly applied only to the workplace others clearly did not. Descriptor 14(b) used the example of a lunchbreak, and descriptor 14(c) used the example of an appointment. Each could relate to the workplace, but were only examples. The task for the Tribunal was to consider whether the applicant would fail to cope with any change, minor planned change, or minor unplanned change to the extent that day to day life could not be managed by her, or that day to day life would be made significantly more difficult.

[21] The Commissioner also considered that the facts of **GC** could be distinguished and so the Tribunal had not erred by not having asked the applicant about the effect of her previous employment on her health. In reaching this conclusion the Commissioner noted that the applicant had last worked before March 1996. She was originally certified as unfit for work on the basis of post-natal depression and had given birth to three more children since then. There was no evidence connecting her illness to the workplace.

[22] As to whether the Tribunal had exercised its inquisitorial jurisdiction to adduce relevant evidence, the Commissioner considered that the Tribunal had asked the applicant about coping with day to day change. It talked to her about her household activities, and she explained that she would do the cooking and washing for the family. She gave the example of her 16 year old wanting clothes as an example of inability to cope. She also talked about changes in appointments. In this context, the record of proceedings read "*Would be able to go to a later appointment if needed to. Husband would give lift*". The Tribunal accepted for the purposes of Activity 15 that the applicant would require to be accompanied in order to get to a specific place with which she was unfamiliar. The question in Activity 14 was whether she "*cannot cope*" to the extent that "*overall, day to day life is made more difficult*". The Commissioner considered that there was no rule which precluded the Tribunal from awarding points under different activity headings for the same event.

However, it had been reasonable for the Tribunal to assess that, notwithstanding the fact that the applicant's husband might be required to accompany her to a rescheduled appointment – just as he would have had to accompany her to the original appointment – the fact that the applicant could attend a rescheduled appointment indicated that the change would not have made her day to day life significantly more difficult.

[23] The Commissioner also referred to the general evidence of the applicant's ability to manage a busy household. While the Tribunal had acknowledged that the applicant sought to maintain routine in the interests of the needs of the children, it found that the applicant could adapt to change. The Commissioner agreed with the proposition made on behalf of the applicant that activity the applicant could perform while supported should not be taken into account, but only activity on her own. However, he considered that the Tribunal had addressed the applicant's ability to cope on her own and that it had adduced sufficient evidence of the applicant's day to day life to determine the issue. He therefore dismissed the appeal.

The court's approach to the question of leave to appeal

[24] In considering this matter the court is mindful of the fact that the applicant has already had two unsuccessful appeal hearings before specialist independent tribunals in the form of the Appeal Tribunal and the Commissioner.

[25] It is important to note that the decision under challenge in this application is not governed by an equivalent to section 13 of the Tribunals, Courts and Enforcement Act 2007 (because in this jurisdiction the Social Security Commissioner continues to operate and has not yet been subsumed within the Upper Tribunal structure established under the 2007 Act) or section 55 (1) of the Access to Justice Act 1999 which deals with second-tier appeals from the High Court or County Court to the Court of Appeal, both of which provide that leave should not be granted unless the Court of Appeal considered that the proposed appeal would raise some important point of principle or practice, or there was some other compelling reason for the court to hear the appeal.

[26] Nonetheless it is clear that the authorities suggest that it is appropriate to impose a high threshold on an applicant seeking to appeal second-tier decisions of specialist independent tribunals.

[27] In **Cooke v Secretary of State for Social Security** [2002] 3 All ER 279 the Court of Appeal in England and Wales considered the test for permission to appeal from a decision of a Social Security Commissioner, made on an appeal from a Tribunal. Although (as in this case) section 55(1) of the Access to Justice Act 1999 did not apply Hale LJ, giving the judgment of court said at paragraph [14]:

"But many of the reasons underlying that provision apply with equal force in these circumstances, and indeed some might think them stronger.

[15] Firstly, this is a highly specialised area of law which many lawyers – indeed, I would suspect most lawyers – rarely encounter in practice. Secondly there is an independent two-tier appellate structure. … After the initial decision there is a fresh hearing before a specialist tribunal which is chaired by a lawyer and has an appropriate balance of experience and expertise amongst its members. After that there is an appeal on a point of law to a highly expert and specialised legally qualified body, the Social Security Commissioners. Thirdly, it is essential that that tribunal structure is sufficiently expert to be able to take an independent and robust view, particularly in cases where the Government agency has gone wrong. It must be in a position to see through what the relevant sponsoring department is saying when it is arguing the case.

[16] It is also important that such appeal structures have a link to the ordinary court system, to maintain both their independence of government and the sponsoring department and their fidelity to the relevant general principles of law. But the ordinary court should approach cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it right. The Commissioner's will know how that particular issue fits into the broader picture of Social Security principles as a whole. They will be less likely to introduce distortion into these principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.

[17] In my view the Court of Appeal should take an appropriately modest view, especially when it has heard only one side of the argument, of how likely it is that the Commissioner will have got it wrong. …"

[28] Baroness Hale returned to this theme in her judgment in the House of Lords decision in **AH (Sudan) v Secretary for the Home Department)** [2008] 1 AC 678 at paragraph [30]:

> *"This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see* ***Cooke v Secretary of State for Social Security*** *[2002] 3 All ER 279 , para 16."*

[29] In **EBA v Advocate General for Scotland (Public Law, Project and Others Intervening)** [2012] 1 AC 710 the Supreme Court considered an application for judicial review of the decision of a First Tier Tribunal to refuse the applicant permission to appeal against the refusal of her appeal against the decision of the Department for Work and Pension to refuse her claim to disability living allowance and against a decision of the Upper Tribunal Judge to also refuse her permission to appeal from the First Tier Tribunal. Lord Hope said at paragraph [45] of the judgment.

> *"… As the Lord Ordinary observed, the Court of Session has been slow to interfere with decisions of specialist tribunals, and it has been restrained in its approach in reviewing decisions of arbitrators and decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996 2010 SLT 547, para 89. This can be compared with the cautious approach to giving permission to appeal from decisions of the Social Security Commissioners in England and Wales because of their particular expertise in a highly specialised area of the law that was indicated by Hale LJ in* ***Cooke v Secretary of State for Social Security*** *[2002] 3 All ER 279 , paras 15–17."*

[30] In conclusion it is clear that this court must exercise great caution before granting leave in respect of an appeal from two specialist tribunals.

[31] The court is grateful to counsel in this case for their written and oral submissions which were extremely helpful. Mr Barry MacDonald QC led Mr Aiden McGowan for the applicant. Mrs Nessa Murnaghan QC led Mr Steven McQuitty for the respondent.

The applicant's case

[32] Essentially there are three grounds of appeal relied upon by the applicant.

Ground 1 – Error of law in approach to an interpretation of Activity 14.

Ground 2 – Insufficient enquiry into the applicant's ability to cope with change.

Ground 3 – Failure to provide adequate reasons for the decision.

Ground 1

[33] The essence of the applicant's complaint is that both the Commissioner and the Tribunal failed to apply the "work context" approach required by the legislation, set out in **AS** and approved in **JC**.

[34] The focus of the disputed assessment was whether or not the applicant came within the Activity 14 descriptor in terms of her ability to cope with change.

[35] In considering this argument it is useful to consider the context of the **AS** case and the actual decision of the court. In that case the court was considering the issue as to whether or not the applicant could "repeatedly mobilise" various distances expressed in metres within a "reasonable timescale". In that case the Tribunal and court was concerned with what was meant by "repeatedly … within a reasonable timescale". In interpreting that descriptor the court took the view that the Upper Tier Tribunal failed to interpret the descriptor in the context of the working environment. The outcome was very much determined on the specific facts of the case. Insofar as a principle was established it can be found in paragraph [19] of the judgment as follows:

> "*It follows that the activities and descriptors in Schedule 2 do not exist in some sort of artificial or parallel universe, entirely divorced from the real world of work. They have to be applied on their own terms, but understood against the backdrop of the modern workplace. In deciding whether a particular descriptor is met, decision-makers and tribunals may therefore find it helpful to consider the claimant's ability to undertake the activity in question in a range of different working contexts. However, claimants will not be awarded a defined descriptor simply because they can show that it would apply to them if they were employed to do a particular job in a specific type of working environment.*"

[36] It is clear from his judgment that the Commissioner was fully sighted of the decision in **AS** and recognised that it represented an authoritative statement of the law.

[37] In the applicant's case he was concerned with Activity 14. The Commissioner reflected at paragraph [26] that:

> *"… This concerns the ability of a claimant to cope with change in the context of ability to manage day to day life. Within Activity 14, Descriptor 14(b) uses the example of a lunch break, and Descriptor 14(c) uses the example of an appointment. Each of these could relate to the workplace, but they are only examples. The task of the Tribunal was to consider whether the applicant would fail to cope with any change, minor planned change, or minor unplanned change to the extent that day to day life could not be managed by her, or that day to day life would be made significantly more difficult."*

[38] This approach is entirely consistent with the decision in **AS** in that the "*descriptors have to be applied on their own terms*", albeit understood against the backdrop of the modern workplace. The Commissioner referred to the fact that the descriptors have been refined on several occasions so that they better assess functionality relevant to the needs of the workplace. He pointed out that some of the descriptors expressly refer to the workplace such as, for example 2(b) which involves remaining at a workstation. In assessing 14(b) or 14(c) the descriptor provided the examples of a lunch break or an appointment.

[39] What then was the evidence available to the Tribunal in respect of these descriptors?

[40] The Tribunal had the benefit of an independent expert medical report based on an interview and examination of the applicant. The expert report was unequivocal in concluding that "*overall the history and examination today suggests <u>no significant problems coping with change but some problems going out and coping socially</u>*."

[41] The First Tier Tribunal accepted the evidence of the expert (a qualified Approved Disability Analyst), considering the assessment to be "*fair and reasonable*", as it was entitled to do.

[42] In addition the Tribunal had the benefit of hearing oral evidence from the applicant. On the basis of that evidence the Tribunal found that the applicant had primary responsibility for running a busy household composed of four children, two of whom had been diagnosed with autism.

[43] The Tribunal also had a report from the applicant's own doctor who did not provide any indication that the applicant had difficulties in coping with change even though the pro forma ESA 113 expressly raises that very issue and invites comment.

[44] The Tribunal and Commissioner also had confirmation that the applicant had attended many counselling sessions over six years, specifically aimed at addressing her difficulties and coping with change. This evidence was specifically considered by the Tribunal. The documentation does not support or assert an inability on behalf of the applicant to cope with change. She had stopped attending counselling in February 2013 over a year before the appeal before the Tribunal which was heard on 27 May 2014.

[45] In summarising the decision of the First Tier Tribunal the Commissioner said at paragraph [32]:

> *"[32] The Tribunal considered general evidence of the applicant's ability to manage a household including four children, two of whom had autism. While the Tribunal acknowledged that the applicant sought to maintain routine in the interests and the needs of the children, it found that the applicant could adapt to change. Mrs Carty submits, relying on* ***SP v SSWB****, that activity the applicant could perform while supported should not be taken into account, but only activity on her own. I agree with this as a general proposition. However I consider that the Tribunal addressed the applicant's ability to cope on her own and that it had adduced sufficient evidence of the applicant's day to day life to determine the issue. I consider that it was entitled to reach the conclusion that the applicant should not be awarded points for Activity 14 on the evidence before it."*

[46] On the specific issue of whether the applicant could cope with a change to a planned appointment her evidence to the Tribunal was that she would be able to attend a later appointment if she needed to. The relevant portion from the record of the Tribunal proceedings is as follows:

> *"Change of appointment – big issue. Thinking about it for weeks – does journey mentally – knocks her down. Would be able to go to later appointment if needed to. Husband would give lift."*

[47] The applicant argues that this means that she could only cope with a change of an appointment if supported and she could not therefore cope "on her own" as required by the descriptor. However, the Commissioner was clearly alive to this issue as is clear from paragraph [33] of his judgment:

> *"[33] … It was reasonable for the Tribunal to assess that, notwithstanding the fact that the applicant's husband might*

> *be required to accompany her to a rescheduled appointment – just as he would have had to accompany her to the original appointment – the fact that the applicant could attend a rescheduled appointment indicated that the change would not have made her day significantly more difficult.*"

[48] The evidence does not suggest that the applicant could only deal with a re-arranged appointment because her husband would give her a lift. Her evidence was to the effect that she could attend for a re-arranged appointment and that her husband would give her a lift, just as he would have done for the original appointment. It is clear from the papers that the applicant does not drive and that the Department had awarded the appellant six points under Activity 15(c) ("Getting About").

[49] The court also notes that in the appeal before the Commissioner when the respondent asserted that the applicant's own evidence before the Tribunal had been to the effect that she could cope with a re-arranged appointment the applicant did not contradict that assertion and argue that her ability to attend a rescheduled appointment was only with the support of her husband. Rather the applicant's representative in written submissions stated:

> "*I am instructed that at the Tribunal the questions related to an appointment with the GP. Ms O'Neill felt that this was an appointment that would have to be attended. She stated that a change would 'knock her down', but that she would be able to go to a later appointment.*"

[50] Returning to the submission that there was an error of law in the Commissioner's approach to an interpretation of Activity 14 it is clear that rather than artificially limit his consideration on the relevant descriptor to a work context, the Commissioner has simply acknowledged that the terms of the descriptors are broad enough to encompass activities that occur within and outside of the workplace. He correctly assessed the descriptors on their own terms in accordance with the evidence that was before the First Tier Tribunal.

[51] In assessing the relevant descriptors the Tribunal was bound to assess the applicant in the context of her day to day activities in the home. This accords with the reality that the appellant had not worked in over 18 years at the time of her appeal before the Tribunal. The Tribunal was therefore required to consider her ability to cope with change on the basis of the evidence before it which related, almost exclusively, to activities arising outside of the workplace, simply because the appellant has not been employed for many years. At no stage before the Tribunal or the Commissioner did the applicant seek to point to any specific difficulties that might arise in the workplace context. This is not a case where the applicant had left work because of a restriction in activities which it is argued are continuing. The

Commissioner considered that the facts of **GC** could therefore be distinguished from the applicant's circumstances. She had originally been certified as unfit for work on the basis of postnatal depression and had given birth to three more children since then. There was absolutely no evidence connecting her illness to the workplace.

[52] In addition to the high threshold required by the applicant in seeking leave to appeal against the decision of two expert tribunals, the court is also cognizant of its limited role in relation to the facts determined by those tribunals. As Baroness Hale said in **AH (Sudan) v Secretary of State for the Home Department** [2008] 1 AC 678 at paragraph [30]:

> "*They (the Tribunal) and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decision should be respected unless it is quite clear that they had misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or express themselves differently.*"

[53] In similar vein in **Quinn v Department for Social Development** [2004] NICA 22 the Court of Appeal held at paragraph [29] that an appellate court could disagree with the Tribunal's view of the facts only in very limited circumstances.

[54] In this case both the Tribunal and the Commissioner were clearly aware of the statutory context in which it was operating in finding that the appellant did not have limited capability for work. The Commissioner expressly accepted that the relevant "*backdrop*" to understanding the relevant descriptors was the "*modern workplace*".

[55] Based on the evidence before it the Tribunal and Commissioner were perfectly entitled to come to the conclusion it did in relation to the descriptors within Activity 14 and there is no basis upon which this court could set aside their findings on this issue.

Supplementary arguments

[56] The applicant argued that the Tribunal and Commissioner failed to recognise that any ability she had to cope with change was reliant on support from her family, that there was no attempt on the part of the Tribunal or Commissioner to distinguish between planned and unplanned change and finally that there had been a failure to consider the requirement that the individual must be able to do the activity with reasonable regularity in order to be capable for work.

[57] In relation to the first point the evidence before the Tribunal did not establish that the appellant required support in order to cope with change and the Tribunal was perfectly entitled to come to that conclusion. In relation to distinguishing between planned and unplanned change it is noted that the original appeal form to the Tribunal did not raise this as an issue and the sole focus of the appeal related to Activity 14 descriptor (c) which relates to minor unplanned change. In any event the example dealt with on the evidence related to a planned change namely the re-arranged appointment and so in fact this issue was properly assessed.

[58] As to the issue of reasonable regularity the applicant complains that there was no enquiry as to the impact that several changes in one day would have upon her. Again this matter was not expressly pursued on the ground of appeal before the Commissioner. The main authority on this case is the decision in **AS** which expressly dealt with a requirement to repeatedly mobilise within a reasonable timescale. Obviously any particular case needs to be seen in the context of the descriptor being assessed. In **AF v Secretary of State** [2011] UUT 61 AAC (CE/1992/2010) Judge Turnbull concluded that in assessing a particular activity there remained a need for tribunals to consider whether the task could be performed with some degree of repetition. Nevertheless he held at paragraph [12] of the judgment that:

> *"A Tribunal is unlikely to need expressly to consider this issue unless there is something in the facts which suggest the claimant might not be able to perform the activity with some degree of regularity."*

[59] In dismissing the claimant's appeal in the case of **AG v Secretary of State for Work and Pensions** [2003] UKUT 077 (AAC), Judge Paines said at paragraph [17] that he agreed with Judge Turnbull (as to the practical limits of this principle) and held that:

> *"There is nothing in the Tribunal's decision in the present case to suggest that their silence on the question of reasonable regularity means that they adopted the wrong approach to the interpretation of the descriptor that had been adopted in Judge Turnbull's case."*

[60] At paragraph [18] Judge Paines held that:

> *"The statutory question posed to decision-makers and tribunals by the descriptors and the limited capability for work assessment (and similar previous assessment models) is whether the description set out in a descriptor fits the claimant – in other words, whether the claimant can fairly be described, for example, as someone who cannot bend, kneel or squat as if to pick up a light object off the floor and*

straighten up again. It is implicit in this that a description set out in a descriptor will not fit a claimant who can only perform the relevant task exceptionally or infrequently; conversely, even the fittest person could not perform an indefinite series of repetitions of, for example, the bending and kneeling tasks that I have referred to. Judicial references to 'reasonable regularity' reflect this. But judicial expeditions of the meaning of legislative provisions should not be treated as extending the wording under the provision in such a way that tribunals that do not recite the extended wording are to be taken to have misdirected themselves."

[61] In this case the Tribunal did assess the applicant's ability to cope with change, in the context of the specific example given in the descriptor. It was entitled to come to the conclusion that it did based on the evidence in terms of her answer to the specific questions about appointments and also in terms of her ability to perform a variety of tasks in a busy household including attending to the needs of her children on a daily basis.

[62] The Tribunal and the Commissioner were perfectly entitled to come to the conclusion on the evidence, applying the relevant law, that the applicant did not meet the relevant descriptors. Whether or not the applicant can cope with minor planned change or minor unplanned change to the extent that overall, day to day life, is made significantly more difficult is essentially a matter of expert assessment and judgment. The Tribunal and the Commissioner made that assessment and judgment fully cognizant of the applicable law.

[63] In terms of the applicant's criticism that it was wrong of the Tribunal to award points under different activity headings this was dealt with by the Commissioner at paragraph [31]:

"The Tribunal had accepted for the purpose of Activity 15 that the applicant would require to be accompanied in order to get to a specific place with which she was unfamiliar. The question in Activity 14 was whether she 'cannot cope' to the extent that 'overall, day to day life is made more difficult'. I consider that there is no rule which would preclude the Tribunal for awarding points under different activity headings for the same event. However, it was reasonable for the Tribunal to assess that notwithstanding the fact that the applicant's husband might be required to accompany her to a rescheduled appointment – just as he would have to accompany to the original appointment – the fact that the applicant could attend or reschedule the

> *appointment indicated that the change would not have made her day to day life certainly more difficult."*

[64] The applicant argues that the Tribunal (and the Commissioner) fell into error by refusal to award points because the difficulty coping with change is linked to the distress from coping with social engagement or getting about.

[65] The Tribunal did not do this. Rather, the Tribunal found, based on all the evidence, that the appellant adapted to change when required and did not consider that there was evidence to support a finding that day to day life was made significantly more difficult for the appellant by minor unplanned change – something which it was entitled to do in our view.

Grounds 2 and 3

[66] It follows from much of what has been said that Grounds 2 and 3 fall away.

Ground 2

[67] In relation to Ground 2 the Tribunal had the benefit of an expert medical report which was produced following clinical examination, observation and assessment of the applicant. The doctor recorded, in some detail, a description from the applicant of her functioning ability, her social history and her typical day. The Tribunal heard oral evidence from the applicant who had the benefit of an experienced advisor from Belfast Citywide Tribunal Service at her hearing before the Tribunal and the benefit of an experienced solicitor from the Law Centre at the hearing before the Commissioner.

[68] This is not a situation similar to the facts in **GC** where the Tribunal had recorded that the appellant had suffered depression and was under a lot of strain and pressure in his work. In that case the Upper Tribunal found that the Tribunal had omitted the vital question of asking what had caused the strain and pressure as only then could the Tribunal have decided whether or not it was relevant to one of the scoring activities.

[69] In addition to the evidence before it about the applicant's day to day activities the Tribunal specifically enquired about her ability to cope with change and asked about the specific example provided in the descriptor namely the change in an appointment.

Ground 3

[70] As to inadequate reasons we take the view that the First Tier Tribunal and the Commissioner have given intelligible and adequate reasons for their decisions. Dealing specifically with the Commissioner's decision he has accurately set out the

background to the case, the grounds of the applicant's appeal, a summary of the Tribunal's decision, proper analysis of the relevant legislation, a summary of the arguments before him with specific reference to the relevant case law and finally an assessment of the matter which clearly sets out the reasons for his conclusion.

[71] In relation to Ground 3 the applicant is critical of the failure of the Commissioner to deal with the fact that she had been in receipt of incapacity benefit for over 17 years. In relation to this particular issue the fact that the appellant had previously been in receipt of incapacity benefit does not raise any presumption in her favour. This was not a case where the Tribunal was refusing to renew a previous award. It was assessing a different benefit subject to a different test.

[72] The applicant further complained that the Commissioner did not explain why he concluded that it was reasonable for the Tribunal to consider the applicant could attend a rescheduled appointment, leading to the conclusion that such a change would not have made her day to day lifestyle any more difficult. This is reliant on the submission that the only reason why the applicant could attend the rescheduled appointment was because of support from her husband. This matter has already been dealt with at paragraph [48] above and we consider that this matter has been adequately dealt with by both the Tribunal and the Commissioner.

[73] Overall much of the appeal has the flavour of an attempt to revisit the merits of the assessment made by the First Tier Tribunal and the Commissioner, something which is impermissible.

[74] Leave to appeal is therefore refused.